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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (CGM) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. KOCH INDUSTRIES, INC., as successor in interest of Koch Investment (UK) Company, Defendant.	Adv. Pro. No. 12-01047 (CGM)

DEFENDANT KOCH INDUSTRIES, INC.'S
REQUEST FOR CERTIFICATION OF DIRECT APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Pursuant to 28 U.S.C. § 158(d)(2) and Federal Rule of Bankruptcy Procedure 8006(f), Defendant Koch Industries, Inc. ("Defendant") hereby requests a certification enabling the United States Court of Appeals for the Second Circuit to consider a petition for a direct appeal from the Order entered on November 30, 2022 (the "Order"), ECF No. 122, attached here as Exhibit A, following the November 21, 2022 Memorandum Decision Denying Defendant's Motion to Dismiss (the "Decision"), ECF No. 118, attached here as Exhibit B.[1]

PRELIMINARY STATEMENT

Subject to the instant request, Defendant intends to petition the Court of Appeals to hear a direct appeal from the Order. Although the ultimate decision whether to accept the appeal is reserved for the Court of Appeals, this Court must first certify that the appeal satisfies one of the grounds enumerated in 28 U.S.C. § 158(d)(2)(A).

Under 28 U.S.C. § 158(d)(2)(B), the Court "shall" certify a direct appeal if the appeal satisfies any of the statutorily enumerated grounds, including that: (1) the appeal raises a question of law on which there is no controlling decision from the Court of Appeals for this Circuit or from the Supreme Court; (2) the appeal involves a matter of public importance; or (3) an immediate appeal may

[1] Unless otherwise noted, "ECF No." refers to filings on the bankruptcy court docket in Adv. Pro. No. 12-01047.

materially advance the litigation. *See* 28 U.S.C. § 158(d)(2)(A)(i), (iii). Defendant's appeal satisfies each of these grounds and thus certification is required.

First, Defendant's appeal involves no fact issues and solely raises a question of law on which there undisputedly is no controlling decision from the Court of Appeals or the Supreme Court—namely, whether the Bankruptcy Code's statutory safe harbor under 11 U.S.C. § 546(e) ("Section 546(e)") is inapplicable where the initial transferee of a claimed fraudulent transfer is alleged to have "actual knowledge" of fraud. On this question, the Decision treats as controlling a 2013 decision of Judge Rakoff, *see SIPC v. Bernard L. Madoff Inv. Secs. LLC (In re Consolidated Proceedings on 11 U.S.C. § 546(e))*, No. 12 MC 115, 2013 WL 1609154 (S.D.N.Y. Apr. 15, 2013) ("*Cohmad*"), and a 2022 opinion of Judge Rakoff reaffirming his 2013 decision, *see Picard v. Multi-Strategy Fund Ltd. (In re BLMIS)*, No. 22-CV-06502, 2022 WL 16647767 (S.D.N.Y. Nov. 3, 2022)—not any Court of Appeals or Supreme Court decision. Indeed, Plaintiff Irving H. Picard, Trustee (the "Trustee") for the Liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"), for his part, has repeatedly acknowledged there is no Second Circuit decision on the question presented by Defendant's appeal. *See infra* 13.

Second, Defendant's appeal involves a matter of public importance. Congress designed the Section 546(e) safe harbor to strike a balance, embodied in the plain language of Section 546(e), between the public policy goals of pursuing equity for bankruptcy debtors and their creditors and of respecting the finality of certain financial transactions to protect the broader public interest in the steady operation of the financial markets. *See Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Secs. LLC)*, 773 F.3d 411, 420 (2d Cir. 2014). The insertion of an "actual knowledge" limitation in Section 546(e) pursuant to the district court decision in *Cohmad* alters that public policy balance and implicates the public interest in protecting stable market operations.

Third, a direct appeal to the Second Circuit will materially advance the progress of this case by expediting resolution of a case-dispositive legal question. The question presented in Defendant's appeal also affects numerous other BLMIS adversary proceedings and, thus, expedited review by the Second Circuit would contribute to the efficient resolution of those cases as well.[2]

As certification is required when any one of these three grounds is present, Defendant respectfully requests that the Court certify a direct appeal of the Order.

[2] As of August 2022, there were 17 BLMIS adversary proceedings subject to complete dismissal based on a Section 546(e) defense. *Picard v. Multi-Strategy Fund Ltd.*, No. 22-cv-6502-JSR (S.D.N.Y. Aug. 1, 2022), ECF No. 4, Ex. C.

STATEMENT OF TIMELINESS AND JURISDICTION

This request for certification of a direct appeal is timely as it was filed within 60 days of the entry of the Order on November 30, 2022. *See* Fed. R. Bankr. P. 8006(f)(1); Fed. R. Bankr. P. 9006(a)(1)(C) (when the last day of a time period is not a business day, the period runs until the next business day).

Bankruptcy Rule 8006 provides that a request for certification shall be filed in the court "where the matter is pending," and further specifies that "a matter remains pending in the bankruptcy court for 30 days after the effective date under Rule 8002 of the first notice of appeal from the … order … for which direct review is sought." Defendant timely filed a notice of appeal and motion for leave to appeal on January 4, 2023.[3] ECF Nos. 124, 125, 126. Because the effective date of Defendant's notice of appeal is January 4, 2023, this appeal matter will remain pending in the bankruptcy court through February 3, 2023. *See* Fed. R. Bankr. P. 9006(a)(1). Beginning on February 4, 2023, the matter will be pending in the district court, *see* Fed. R. Bankr. P. 8006(b), and, as a result, the bankruptcy court will no longer have jurisdiction to rule on this request for certification. *See* Fed. R. Bankr. P. 8006(d) ("Only the court where the matter is pending … may certify a direct review on request of parties or on its own motion."); *accord SIPC v.*

[3] Defendant's motion for leave to appeal has now been docketed at *Koch Industries, Inc. v. Picard*, No. 23-cv-00294-VEC (S.D.N.Y.).

BLMIS, LLC, Adv. Pro. No. 11-02760, 2017 Bankr. LEXIS 2016 (Bankr. S.D.N.Y. July 19, 2017) ("After thirty days from the filing of the notice of appeal, the Bankruptcy Court loses jurisdiction, and the matter is deemed pending in the District Court.").

BACKGROUND

On February 9, 2012, the Trustee commenced the above-captioned adversary proceeding against Defendant, seeking to avoid transfers BLMIS allegedly made to Fairfield Sentry Limited ("Fairfield Sentry") and recover the amount of those transfers from Defendant as a "subsequent transferee" of Fairfield Sentry.[4] The Trustee has filed numerous, substantively similar complaints. *See, e.g.*, Trustee's Interim Report, *SIPC v. BLMIS LLC*, No. 08-1789 (Bankr. S.D.N.Y. Apr. 29, 2022) (ECF No. 21473-4, Ex. D) (Attached here as Exhibit C).

Fairfield Sentry maintained customer accounts with BLMIS for the purpose of investing assets with BLMIS and received payments from BLMIS through withdrawals from those customer accounts, which it in turn transferred to its investors. Complaint ¶¶ 2, 34-37 & Exs. A, B; *see also* Incorporated Complaint ¶¶ 20, 33 & Ex. 2. Fairfield Sentry opened its first account at BLMIS in November

[4] The following background relies upon the allegations in the Complaint and the Amended Complaint filed in *Picard v. Fairfield Sentry Limited*, Adv. Pro. No. 09-01239 (Bankr. S.D.N.Y. filed July 20, 2010) (ECF No. 23) ("Incorporated Complaint"), which the Complaint incorporates by reference, *see* Complaint ¶ 33.

1990 and a second account in October 1992, executing account opening agreements with BLMIS when it did so. Incorporated Complaint ¶ 33 & Ex. 1.

Koch Investment (UK) Company ("KIUK"), a former affiliate of Defendant, was an investor in Fairfield Sentry and received redemption payments from Fairfield Sentry on May 11, 2005, and September 20, 2005—each more than three years before the filing date of BLMIS's SIPA liquidation proceeding (December 15, 2008). Complaint ¶ 39 & Ex. C. The Complaint alleges Defendant received these same funds when KIUK was later dissolved. *Id.* ¶¶ 2, 32, 39.

Defendant moved to dismiss the Complaint, arguing that the at-issue transfers from BLMIS to Fairfield Sentry are shielded from avoidance by Section 546(e). *See* ECF No. 106. The Trustee argued that the transfers did not qualify for the Section 546(e) safe harbor based on the Trustee's allegations that Fairfield Sentry ultimately acquired knowledge of BLMIS's fraud. *See* ECF No. 110.[5]

On November 21 and November 30, 2022, the Court issued the Order and Decision denying Defendant's motion to dismiss, considering itself bound by Judge Rakoff's interpretation of Section 546(e) in *Cohmad* to foreclose application of the safe harbor where the initial transferee (here, Fairfield Sentry) had actual

[5] The Trustee does not allege that either KIUK or Defendant themselves had any knowledge of the fraud when KIUK received the two redemption payments from Fairfield Sentry in 2005.

knowledge of fraud. *See* ECF No. 118 at 7.[6] In *Cohmad*, Judge Rakoff reasoned, as a matter of first impression, that a defendant "will not be able to prevail on a motion to dismiss some or all of the Trustee's avoidance claims simply on the basis of the Section 546(e) 'safe harbor' *if* the Trustee has alleged that the initial transferee [here, Fairfield Sentry] had actual knowledge of [BLMIS's] fraud," even if avoidance of the transfers "would otherwise be barred by Section 546(e)." 2013 WL 1609154, at *1 (emphasis in original). The Court viewed Judge Rakoff's conclusion as "consistent with dicta set forth by the Court of Appeals for the Second Circuit" in *Ida Fishman*. ECF No. 118 at 8. Relying on a prior holding "that the Fairfield Complaint contains sufficient allegations of Fairfield Sentry's actual knowledge" of BLMIS's fraud, the Court concluded that the Complaint could not be dismissed under Section 546(e). *Id.* at 9.

[6] *Cohmad* was issued in a consolidated proceeding for BLMIS-related adversary proceedings, including this case, in which the district court withdrew the reference pursuant to 28 U.S.C. § 157(d) for the limited purpose of issuing preliminary legal rulings. After those rulings, proceedings resumed before the bankruptcy court. That the district court issued preliminary legal rulings on withdrawal of the reference has no bearing on whether this request satisfies the grounds for certification of direct appeals set forth in 28 U.S.C. § 158(d)(2)(A). *Cf. Jaffe v. Samsung Elecs. Co. (In re Qimonda AG)*, 470 B.R. 374, 389 (E.D.V.A. 2012) ("[N]othing in the statutory language or legislative history of § 158(d)(2) suggests that a matter's procedural posture has, or should have, any impact whatever on whether certification is appropriate or conditions the requirement that a district court certify an order where the statutory triggers are met on whether or not that order is the result of a remand.").

QUESTION PRESENTED ON APPEAL AND RELIEF REQUESTED

Section 546(e) of the Bankruptcy Code provides in relevant part that a trustee "may not avoid" transfers made by a stockbroker "in connection with a securities contract." 11 U.S.C. § 546(e). The question presented is: Whether Section 546(e) excludes from its statutory safe harbor all transfers where the initial transferee allegedly had "actual knowledge" of the transferor's fraud, despite the lack of any such limitation in the statutory text.

Defendant respectfully requests that this Court certify a direct appeal of the Order so it can petition the United States Court of Appeals for the Second Circuit to expedite resolution of this important, open, and recurring question of law.

ARGUMENT

Congress assigned to the Courts of Appeals the ultimate responsibility for deciding whether a direct appeal from a bankruptcy court order is warranted. 28 U.S.C. § 158(d)(2)(A) (direct appeal permitted "if the court of appeals authorizes the direct appeal"); *see Weber v. U.S. Tr.*, 484 F.3d 154, 161 (2d Cir. 2007) (noting that "Congress has explicitly granted [the court of appeals] plenary authority to grant or deny leave to file a direct appeal"); *see also* 1 Collier on Bankruptcy ¶ 5.06[4][e] ("[I]t is apparent that the courts of appeals are intended to be the gatekeepers here.").

Under 28 U.S.C. § 158(d)(2), the role of a bankruptcy or district court with jurisdiction over an appeal matter is limited to determining whether any of the statutorily enumerated grounds for a direct appeal exists. *See Citigroup Inc. v. Bruce (In re Bruce)*, No. 21-cv-7455, 2021 WL 6111925, at *5 (S.D.N.Y. Dec. 27, 2021) (declining to address arguments that "can be made before the Second Circuit" about the "propriety" of allowing appeal); *Homaidan v. Sallie Mae, Inc.*, No. 19-cv-935, 2020 WL 5668972, at *2 (E.D.N.Y. Feb. 25, 2020) (the Second Circuit is the "proper forum" for arguments about the merits of the appeal and whether an immediate direct appeal is warranted as a matter of discretion).

On request, a bankruptcy or district court with jurisdiction over a matter "shall" certify a direct appeal to the Court of Appeals when the order appealed:

> (i) involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) involves a question of law requiring resolution of conflicting decisions; or
>
> (iii) [where] an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A); § 158(d)(2)(B)(i); *see also* Order, ECF No. 22, *Picard v. ABN AMRO Bank N.V.*, No. 1:20-cv-03684-VEC (S.D.N.Y. July 16, 2020).

Congress enacted 28 U.S.C. § 158(d)(2)(A) to *promote* Circuit-level review of bankruptcy orders and, thereby, development of binding bankruptcy precedent.

Weber, 484 F.3d at 158 (Congress designed Section 158 to remedy "the paucity of settled bankruptcy-law precedent" created by the fact that "'decisions rendered by a district court as well as a bankruptcy appellate panel are generally not binding and lack stare decisis value'") (quoting H.R. Rep. No. 109-31, at 148 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 206). In keeping with that purpose, Section 158(d)(2) is both disjunctive and mandatory. If "any one of [the listed] factors exists" for a direct appeal, the Court shall grant certification. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 508 (2015) (noting that Section 158(d)(2) "allows a broader range of interlocutory decisions to make their way to the court of appeals" than 28 U.S.C. § 1292(b) does); *In re Bruce*, 2021 WL 6111925, at *5 (if one factor satisfied, certification is mandatory).

Here, three grounds independently require certifying a direct appeal of the Order. First, there is no controlling decision addressing the question whether there is an "actual knowledge" limitation on Section 546(e)'s safe harbor. *See* 28 U.S.C. § 158(d)(2)(A)(i). Second, this question is a matter of public importance, affecting the stability of the financial markets. *See id.* Third, a direct appeal would materially advance the resolution of this proceeding and many other BLMIS-related adversary proceedings. *See id.* § 158(d)(2)(A)(iii).

I. There Is No Controlling Second Circuit Or Supreme Court Decision Addressing Whether *Cohmad* Correctly Imposed An "Actual Knowledge" Limitation On Section 546(e) Safe Harbor.

Neither the Second Circuit nor the Supreme Court has issued a controlling decision on the specific question of whether the Section 546(e) safe harbor excludes transfers where the initial transferee had "actual knowledge" of fraud. "Controlling law for the purposes of section 158(d)(2)(A)(i) is that which admits of no ambiguity in resolving the issue." *Springfield Hosp., Inc. v. Carranza (In re Springfield Hosp., Inc.)*, 618 B.R. 109, 115-16 (Bankr. D. Vt. 2020) (quoting *In re Millenium Lab Holdings II, LLC*, 543 B.R. 703, 711 (Bankr. D. Del. 2016)).

The absence of definitive precedential guidance on the question presented is apparent from the district court decision in *Cohmad* that the Decision relies upon. *Cohmad* held as a matter of first impression that "actual knowledge" precludes resort to Section 546(e)'s safe harbor. *See Cohmad*, 2013 WL 1609154, at *10. It does not cite any Second Circuit or Supreme Court decision as support for imposing an "actual knowledge" limitation on the Section 546(e) safe harbor.

When the bankruptcy court thereafter applied *Cohmad* to dismiss a complaint because the Trustee failed to allege the initial transferee's actual knowledge of fraud, the Trustee himself sought a direct appeal. *See Picard v. Merkin (In re BLMIS LLC)*, Adv. Pro. No. 08-01789, 2014 WL 6879064 (Bankr. S.D.N.Y. Dec. 4, 2014). Although that request was deemed moot, the Trustee

argued there, as Defendant does here, that whether the initial transferee's actual knowledge of fraud affects the application of Section 546(e)'s safe harbor "is a question to which there is no controlling decision of the Second Circuit or Supreme Court." Trustee's Memorandum of Law in Support of Motion to Direct Entry of Final Judgment Under Federal Rule of Civil Procedure 54(b) and to Certify Judgment for Immediate Appeal Under 28 U.S.C. § 158(d) at 20, *Picard v. Merkin*, Adv. Pro. No. 09-1182 (Bankr. S.D.N.Y. Sept. 5, 2014), ECF No. 227.[7]

The Second Circuit decided *Ida Fishman* after the district court's decision in *Cohmad*, but that subsequent decision does not squarely address *Cohmad* or its actual knowledge limitation, as there were no allegations that the transferees in *Ida*

[7] At the time *Cohmad* was decided (and even after), the Trustee argued that Section 546(e) is inapplicable to *any* transfers BLMIS made, regardless of the initial transferee's knowledge or mental state—a position the Second Circuit later rejected in *Ida Fishman*. In fact, before *Cohmad*, the Trustee argued all BLMIS transfers should be excluded from Section 546(e) safe harbor to avoid "injustice" because "[S]ection 546(e) does not differentiate between good faith and bad faith investors." Trustee's Memorandum of Law in Opposition to Greiff's Motion to Dismiss at 2, 30-31, *Picard v. Greiff (In re Bernard L. Madoff Inv. Secs. LLC)*, No. 11-cv-3775 (S.D.N.Y. Oct. 26, 2011), ECF No. 33 (emphasis added). And in his Second Circuit briefing in *Ida Fishman*, the Trustee continued to question the soundness of an "actual knowledge" exception, stating that "the district court [in *Cohmad*] created an entire statutory construct out of whole cloth" in adding a lack of knowledge prerequisite to Section 546(e), "rewr[iting] both the Bankruptcy Code and SIPA in order to reach a result it preferred to the one Congress chose," and that it "serves neither reason nor the statute to base application of the safe harbor on the subjective beliefs of customers and the legitimacy of their expectations." Brief for Plaintiff-Appellant at 57, 58, *Picard v. Ida Fishman Revocable Tr. (In re Bernard L. Madoff Inv. Secs. LLC)*, No. 12-2557 (2d Cir. May 15, 2013), ECF No. 145.

Fishman had "actual knowledge" of fraud. *See* 773 F.3d at 420; Decision at 8 (referring to *Ida Fishman* as "dicta" on the question); *Picard v. Cohen*, Adv. Pro. No. 10-04311, 2016 WL 1695296, at *10 n.16 (Bankr. S.D.N.Y. Apr. 25, 2016) (noting that *Ida Fishman* did not address the application of Section 546(e) to "investors who had actual knowledge that BLMIS was not trading securities"). The Trustee has also acknowledged, on separate occasions, that "*Ida Fishman* did not address the actual knowledge exception." Trustee's Memorandum of Law in Opposition to Defendant Koch Industries, Inc.'s Motion to Dismiss, ECF No. 12 at 7; *see also* Trustee's Opposition to Defendant Multi-Strategy Fund Limited's Motion for Leave to Appeal Under 28 U.S.C. § 158(a)(3) at 14-15, *Picard v. Multi-Strategy Fund Ltd.*, No. 22-cv-6502 (S.D.N.Y. Sept. 6, 2022), ECF No. 10 ("*Fishman* did not address the safe harbor's application as set forth in *Cohmad* where the Trustee has alleged that an initial transferee actually knew of Madoff's fraud").

While *Ida Fishman* did not address the question of "actual knowledge," *Ida Fishman*'s reasoning conflicts with the district court's reasoning in *Cohmad*, introducing further uncertainty in the absence of a precedential decision. In *Ida Fishman*, the Second Circuit rejected the Trustee's invitation to read into Section 546(e) another unwritten limitation—that the safe harbor excludes agreements that would otherwise qualify as "securities contracts" if no securities transactions were

ultimately executed—and adopted an objective test to determine whether an agreement qualified as a securities contract. *Id*. at 418, 420, 422. The Second Circuit concluded that it could not "construct[] a requirement [for claiming Section 546(e) safe harbor] that the law does not contain" and the account opening documents executed by the BLMIS investors concerned in that litigation "satis[fied] the broad definition of 'securities contracts' under § 741(7)(A)." *Id*. at 418, 420. The Second Circuit also emphasized that "Section 546(e) is a very broadly-worded safe-harbor provision," which, given the "extraordinary breadth" of its language, must be interpreted to provide expansive coverage. *Id*. at 416-17.

The Decision here reflects the continued absence of precedential guidance from the Second Circuit or the Supreme Court. In determining that the transfers from BLMIS to Fairfield Sentry did not qualify for Section 546(e)'s safe harbor, the Court relied solely on *Cohmad* and Judge Rakoff's 2022 decision reaffirming *Multi-Strategy Fund Ltd.*, 2022 WL 16647767. *See* Decision at 7-8. The Decision identified no controlling Second Circuit or Supreme Court decision.

Although the Court characterized its Decision as "consistent with *dicta* set forth by the Court of Appeals for the Second Circuit" in *Ida Fishman* (*id.* at 8 (emphasis in original)), a characterization Defendant disputes, *see* ECF No. 106 at 11-12, necessarily, Circuit-level dicta, without more, does not qualify as controlling law. *See, e.g.*, *In re Bruce*, 2021 WL 6111925, at *3 (bankruptcy

court's references to dicta "demonstrate that there is a lack of controlling authority"); *Troisio v. Erickson (In re IMMC Corp.)*, Civ. No. 15-1043, 2016 WL 356026, at *5 (D. Del. Jan. 28, 2016) ("[D]icta … does not render the case a controlling decision of the … Circuit."); *see also Katz v. Kerski Assocs., L.P. (In re Ressler)*, No. 17-cv-666, 2018 WL 10246961, at *4 (D. Conn. Jan. 31, 2018) (certifying appeal where "Second Circuit has not addressed th[e] question directly" and had simply "considered a related, but different, question").

In short, nearly ten years later, the Second Circuit has yet to review any order applying Judge Rakoff's decision in *Cohmad*, and thus there remains no precedential decision on whether there is an actual knowledge limitation on the Section 546(e) safe harbor. This case presents the exact situation 28 U.S.C. § 158 was intended to address. *See Weber*, 484 F.3d at 158. Under Section 158(d)(2)(A)(i), the absence of Supreme Court or Second Circuit precedent alone compels certification. *See id.* at 159; *Homaidan*, 2020 WL 5668972, at *2.

II. Defining The Parameters Of The Section 546(e) Safe Harbor Is An Issue Of Public Importance.

Certification also is required for the independent reason that this appeal concerns a matter of public importance; that is, "the issue on appeal … transcend[s] the litigants and involve[s] a legal question, the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case" and will impact "the public at large." *In re Nortel Networks Corp.*, No. 09-

10138, 2010 WL 1172642, at *2 (Bankr. D. Del. Mar. 18, 2010). Defining the parameters of Section 546(e) is of immense public importance and has a widespread impact on the public at large, as the numerous BLMIS adversary proceedings themselves demonstrate. *See supra* 3.

In enacting Section 546(e), Congress was striking a "careful balance[ ] between the need for an equitable result for the debtor and its creditors[ ] and the need for finality" to protect the public interest in the smooth operation of the financial markets. *Ida Fishman*, 773 F.3d at 423; *see also Gredd v. Bear, Stearns Secs. Corp.* (*In re Manhattan Inv. Fund Ltd.)*, 310 B.R. 500, 513 (Bankr. S.D.N.Y. 2002) (The goal of providing a safe harbor in Section 546(e) is "to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." (quoting H.R. Rep. No. 97-420 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583)). Congress was of course aware that, as an equitable matter, broadening the safe harbor would benefit the transferees who received fraudulent transfers. Nonetheless, Congress declined to include in Section 546(e) any explicit exclusion based on the "actual knowledge" or mental state of the transferee. As relevant here, Section 546(e) provides that a trustee "may not avoid a transfer" if the transfer is "made by … a … stockbroker … in connection with a securities contract, as defined in section 741(7)." 11 U.S.C. § 546(e). It lists only one exception to this avoidance bar—transfers that

are avoidable "under section 548(a)(1)(A)" of the Bankruptcy Code, which, in turn, authorizes the avoidance of transfers made with "actual intent to hinder, delay, or defraud" *if* the transfer was made within the two years of the bankruptcy petition (or, as relevant here, the filing date of the Securities and Investor Protection Act liquidation proceeding). *See* 11 U.S.C. § 548(a)(1).[8]

Requiring a fact-intensive inquiry into the "actual knowledge" of transferees, rather than basing application of the safe harbor on a straightforward identification of the type of financial transaction concerned, shifts the "careful balance" Congress struck in Section 546(e) away from market finality. Thus, until the Second Circuit authoritatively resolves whether the Decision erred by imposing an actual knowledge limitation in Section 546(e), participants in the financial

[8] As further discussed in Defendant's motion for leave to appeal (ECF No. 126), Congress's omission of a "actual knowledge" exclusion in Section 546(e) was not inadvertent. Congress knows how to condition a Bankruptcy Code section on a party's knowledge or state of mind when it intends to. Indeed, several provisions of the Bankruptcy Code expressly impose an "actual knowledge" standard. *See* 11 U.S.C. §§ 523(a)(3), 542(c), 726(a)(2)(C)(i), 944(c)(2). In the specific context of a trustee's avoidance and recovery powers, Congress has also provided other defenses to transferees who can demonstrate their "good faith." *See id.* §§ 548(c), 550(b). Section 546(e), in contrast, does not mention the transferee's state of mind and binding Supreme Court precedent tells us that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 216 (2012) (quotation marks omitted).

markets will be left without clear guidance and predictability as to the parameters of Section 546(e) and when their transactions are reliably final.

The public importance of this matter independently justifies certification.

III. Certification Will Materially Advance The Progress Of This Case

Finally, the Court must certify a direct appeal of the Order because it will "materially advance the progress of th[is] case." 28 U.S.C. § 158(d)(2)(A)(iii). This appeal presents the controlling legal question of whether Section 546(e) bars avoidance of the transfers on which the recovery claim in this action is predicated. If Section 546(e) applies without the *Cohmad* "actual knowledge" exception, the transfers upon which the Trustee's recovery claim against Defendant is predicated are shielded from avoidance and therefore unrecoverable. In short, reversal would result in a dismissal of this single-count adversary proceeding, *see, e.g.*, *Ida Fishman*, 773 F.3d at 415 (affirming Rule 12(b)(6) dismissal based on application of Section 546(e)), and "might avoid needless litigation," *Weber*, 484 F.3d at 158.

As a pure question of law involving statutory interpretation, the question presented is ripe for resolution by the Second Circuit. *See Tantaros v. Fox News Network, LLC.*, 465 F. Supp. 3d 385, 390 (S.D.N.Y. 2020) ("statutory interpretation" is "a quintessentially legal determination") (quotation marks omitted). Addressing the question would not require any factual development or addressing any factual disputes. *See Weber*, 484 F.3d at 158 (describing direct

appeal under Section 546(e) as "most appropriate where we are called upon to resolve a question of law not heavily dependent on the particular facts of a case").

There is no benefit to delaying appeal to the Second Circuit for further intermediate appellate proceedings in the district court. At most, another district court appeal would result in another non-precedential decision disagreeing with *Cohmad*, and the Trustee presumably would seek Second Circuit review.

The progress of other recovery actions initiated by the Trustee would also be advanced by appeal, as numerous defendants in other actions have "argue[d] … that there is no actual knowledge exception." Transcript, *Picard v. Multi-Strategy Fund Ltd.*, No. 22-cv-6502-JSR (S.D.N.Y. Aug. 1, 2022), ECF No. 17, at 34 (attached here as Exhibit D). Indeed, as of August 2022, there were 17 BLMIS adversary proceedings subject to complete dismissal based on a Section 546(e) defense and another 41 proceedings subject to partial dismissal. *Picard v. Multi-Strategy Fund Ltd.*, No. 22-cv-6502 (S.D.N.Y. Aug. 1, 2022), ECF No. 4, Ex. C. While the bankruptcy court has consistently denied motions to dismiss in these cases based on Section 546(e), defendants' arguments are preserved for later appeals post-judgment.

Indeed, the Trustee has anticipated that resolution by the Second Circuit is inevitable. In arguing against motions for leave to appeal that challenged different aspects of Judge Rakoff's *Cohmad* holding but did not take issue with the premise

that the 546(e) safe harbor is inapplicable when the transferee has "actual knowledge," the Trustee suggested that interlocutory appellate resolution of that threshold question could be appropriate. In particular, the Trustee noted that, to avoid "piecemeal appeals on section 546(e)," appeal of subsidiary questions as to the exception's applicability should be delayed for resolution of the foundational question of the exception's existence. Transcript, *Picard v. Multi-Strategy Fund Ltd.*, No. 22-cv-6502-JSR (S.D.N.Y. Aug. 1, 2022), ECF No. 17, at 34 (attached here as Exhibit D). Defendant's appeal presents that foundational question.

Accordingly, this factor independently favors certification.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court certify a direct appeal of the Order to the Second Circuit.

Respectfully submitted,

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